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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

NO.

OVERNITE TRANSPORTATION COMPANY,
*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL NO. 171, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Intervenor*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioner prays this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the petitioner respectfully shows to this Court:

### THE OPINIONS OF THE COURT AND ADMINISTRATIVE AGENCY BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at 372 F. 2d 765 (4

Cir.), and is printed in the appendix to this Petition. This case came to that Court upon petition for review of an order of the National Labor Relations Board. The decision of the Board, reported as 157 NLRB No. 103 (1966), is printed in the record which has been filed with this Court.

The decision of the Interstate Commerce Commission in a related case entitled, *Overnite Transportation Co. — Purchase — Rutherford Freight Lines, Inc.*, is reported at 97 MCC 568, and the pertinent parts thereof are also printed in the record which has been filed with this Court.

## JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit, which the petitioner now asks this Court to review, is dated February 6, 1967, and was entered by that Court on that date. An order denying petition for rehearing *en banc* was issued and entered by that Court on April 4, 1967.

Jurisdiction to review the decision of the Court of Appeals, through the procedure of certiorari, is conferred upon this Court by the provisions of 28 U.S.C. §1254.

## QUESTIONS PRESENTED FOR REVIEW

1. When, in the exercise of the exclusive and plenary jurisdiction conferred on it by Section 5(11) of the Interstate Commerce Act, the Interstate Commerce Commission has imposed upon a common carrier requirements for protection of employees who might be affected by its proposed purchase of assets of another carrier, does the National Labor Relations Board have the authority, in a subsequent collateral proceeding, to add to, alter, or nullify the Commission's order and to punish such carrier as if it had wilfully violated

the law in exercising the authority conferred upon it by the Commission?

2. When a labor organization has elected to exercise its right to require that interim conditions for protection of common carrier employees, who might be affected by a proposed transfer of common carrier assets, be established in litigation before the Interstate Commerce Commission and the Commission has established such conditions, is the National Labor Relations Board authorized later to decree that the purchaser violated the law when it acted within the Commission's order and may the Board instead require the purchaser to undertake the establishment of other and different protective conditions through anticipatory pre-purchase bargaining with the same labor organization?

3. After it was shown to the Court of Appeals that the petitioner could not be required to engage in pre-purchase collective bargaining, and Board counsel had conceded this to be true, did the Court exceed its authority by sustaining the Board's order upon the Court's own view of the legal effect of the petitioner's post-purchase conduct although the Board found no illegality with respect to such post-purchase conduct?

4. After a bona fide impasse was reached in collective bargaining following the purchase of common carrier assets, did the National Labor Relations Board have the authority to require the purchaser to yield retroactively and completely to the Union's largest demand as a remedy for an alleged pre-purchase refusal to bargain, even though there is no claim that the purchaser has failed to bargain in good faith since that time and the Board has made no finding that such an unprecedented remedy is necessary to effectuate the policies of the National Labor Relations Act?

## STATUTES INVOLVED

The case involves the following statutes which, because of their length, have been reproduced as to their pertinent text in the appendix to this Petition:

Interstate Commerce Act, 49 U.S.C. §§5(2)(a), (b) and (c)

Interstate Commerce Act, 49 U.S.C. §5(11)

Interstate Commerce Act, 49 U.S.C. §5(13)

Interstate Commerce Act, 49 U.S.C. §20a(2)

National Labor Relations Act, 29 U.S.C. §157

National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (5)

National Labor Relations Act, 29 U.S.C. §§158(d) and (f)

## STATEMENT OF THE CASE

On February 8, 1963, Rutherford Freight Lines, Inc.,[1] being in severe financial distress, contracted to sell its operating authority and certain of its assets to the petitioner, Overnite Transportation Company[2] (G. C. 3, 204; 199-200; U. 1, 208-223).[3] Because both companies are regulated common carriers, consummation of the contract of sale was necessarily made contingent upon the parties obtaining approval of the transaction by the Interstate Commerce Commission as is required under Section 5(2) of the Interstate

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[1]Hereinafter referred to as "Rutherford."

[2]Hereinafter referred to as "Overnite" or "petitioner."

[3]Unless otherwise indicated, all page references are to the printed joint appendix filed in the Court of Appeals, which appendix is now included in the record filed with this Court. References to exhibits are by exhibit number and are designated "Co." for exhibits which Overnite introduced as respondent in the Board proceedings; "G. C." for General Counsel or Board exhibits; and "U." for Union exhibits.

Commerce Act, 49 U.S.C. §5(2), and the Motor Carriers Act of 1935, 49 U.S.C. §301 et seq. The sales contract contained a provision releasing Overnite from any obligation to consummate in case Commission approval should contain conditions or requirements unacceptable to Overnite (U. 1, 220).

When applications for approval of the proposed transaction were submitted to the Commission, a general protest was filed by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in its own behalf and in behalf of its Locals.

Although the Union sought disapproval of the entire transaction, litigation before the Commission centered upon its alternative insistence that the Commission should either require Overnite "to assume Rutherford's obligations under Rutherford's collective bargaining agreement . . ." with the Union, or compel Overnite to provide "protection of seniority rights and establishment of wages" and terms of employment for Rutherford employees "equal to those prevailing in the area" — the latter meaning the same wages, hours and conditions of employment provided for in the Union's contracts (Co. 33-B, 190-191; Co. 33-D, 193). An issue was joined upon Overnite's refusal to accede to these demands of the Union, it being Overnite's position that acquiescence would lead it along Rutherford's trail to financial disaster (236-237).

Consequently, at a hearing before an examiner of the Commission, held in June 1963, Overnite was required to make detailed judicial "representations" or counterproposals

to the Commission for protection of employees to be affected by the proposed transaction. These counterproposals included the estimated number of Rutherford employees who would be offered jobs by Overnite and precisely what Overnite would provide by way of wages, paid vacations, paid holidays, group insurance, moving allowances, and retirement, educational, recreational and seniority benefits, as well as other matters bearing on working conditions generally (Co. 33, 158-162, 171; Co. 33-A, 180; Co. 33-E, 197-198; U. 2, 223-236).

After considering all of the evidence and contentions of the parties, on October 22, 1963, the Commission's examiner issued his report rejecting the Union's demands and contentions and approving the proposed transaction upon the condition that the employees would be accorded the protections Overnite had proposed, with the additional requirement that three months' severance pay should be given by Overnite to any employees displaced by the transaction. The Union appealed to the full Commission, asserting that under the examiner's recommendation "Overnite has not and will not afford adequate protection to those Rutherford employees who would be adversely affected by the acquisition . . ." (Co. 33-D, 192).

On July 31, 1964, the Commission affirmed its examiner's determination, noting particularly that "in view of vendor's declining traffic and revenues and the resulting trend toward substantial deficits which, if continued, will result only in its demise as a carrier, we cannot determine how denial of the instant application could be considered to be consistent with the overall public interest, including that of vendor's employees" (Co. 33-E, 199-200). The parties were given 180 days within which to consummate the transaction.

The Union later instituted suit against the Commission before a special three-judge court in the District of Columbia, seeking an injunction against the Commission's order. The suit was dismissed by that Court on April 20, 1966, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local Union 549 v. United States of America and Interstate Commerce Commission,* 253 F. Supp. 481 (D. D.C. 1966), and such dismissal was affirmed by this Court, *sub. nom. Amalgamated Transit Union, AFL-CIO v. United States,* 385 U.S. 38, 87 S. Ct. 240, 17 L. ed. 2d 35 (1966).

In the meantime, the Union's contracts with Rutherford had expired and bargaining between Rutherford and the Union had not resulted in any new agreement (72-73, 76, 104-108, 124-125, 130-132; Co. 6-18, 126-141).

After entry of the Commission's decision, a controversy developed between Overnite and Rutherford which rendered consummation doubtful and precluded any advance planning as to a date for consummation, if indeed, it was ever to be accomplished (108-110). On October 20, 1964, the Union notified Overnite that Rutherford's employees at Roanoke, Pulaski and Richmond, Virginia and Kernersville, North Carolina "have expressed an interest in working for Overnite when and if you consummate your contract with Rutherford in accordance with the ICC decision" (144). At the same time, the Union asked that it be advised as to the exact date of intended consummation, but made no request for recognition or bargaining (144). That date did not become fixed until November 19, 1964, when the dispute between Overnite and Rutherford was resolved in a meeting at Bristol, Virginia (108-110). Simultaneously with the

resolution of this controversy, Overnite notified the Union of its intention to consummate the transaction as of that date (Co. 23, 147).

By letter dated the following day, the Union inquired "Whether Overnite intends to recognize Teamsters Local Unions" as bargaining representatives of employees "at any of its locations" (147-148). The Company promptly[1] replied that "We are willing to recognize and bargain for contracts with the appropriate unions in separate and appropriate units at Roanoke and Pulaski" (149-150).

After several months of bargaining had not resulted in agreement, the Union filed charges against Overnite, alleging violation of Section 8(a)(5) of the National Relations Act. The Board's investigation of these charges revealed no evidence of bad faith or unlawful conduct on the part of Overnite, either as to timeliness of its recognition of the Union or in its contract negotiations following recognition (39-40). The Board, nevertheless, issued a Complaint against Overnite, alleging that it had unlawfully made "changes in terms and conditions of employment" of ex-Rutherford employees when it hired them according to the proposals made to, and accepted by, the Interstate Commerce Commission (10).

At the hearing before the Board, Overnite sought to introduce into evidence pertinent parts of the proceedings and orders of the Interstate Commerce Commission (52-54, 157-202). This evidence was summarily rejected by the trial examiner "as irrelevant and not relating to the issue in this case"

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[1]The Union's letter, dated on Friday, was delivered to the Company at a time when the appropriate company official was unavailable due to absence from his office and duties in connection with consummation of the transaction. He replied on the fifth working day following receipt of the Union's demand (Co. 25-26, 149-150).

(11). Having thus removed from consideration all that had transpired before the Commission, the trial examiner ruled that Rutherford employees were entitled to protection against any possible adverse effects growing out of changes in their employer's business, that no such protection was available to them except through collective bargaining, and that Overnite had violated the law when it failed to provide this protection before it consummated the purchase transaction according to the Commission's authorization.

As a remedy, the trial examiner directed that Overnite shall be required to install, retroactively to the date of its consummation of the purchase, the identical wages, benefits and terms and conditions of employment which the Union unsuccessfully sought to have imposed upon the transaction by the Interstate Commerce Commission. In ordering this remedy, the trial examiner gave no consideration to the conceded fact that Overnite had bargained in complete good faith with the Union throughout the intervening period. On appeal, the Board affirmed the trial examiner's decision (32-34).

The Court of Appeals gained jurisdiction over the proceeding by virtue of a petition for review of the Board's order filed by Overnite pursuant to the provisions of Section 10(f) of the National Labor Relations Act. 29 U.S.C. §160(f). A panel of the Court reviewed the order. Upon the jurisdictional issue, the panel ruled that, whatever the Interstate Commerce Commission may do, the Labor Board has full authority to impose further conditions upon carriers (Appendix,[1] p. 9a).

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[1]The appendix to this petition.

Without expressly ruling upon the question of whether the Board has the authority to require pre-purchase bargaining by a common carrier, the Court sustained the Board on that issue, apparently upon the theory that, even in absence of a duty to engage in pre-purchase collective bargaining, Overnite was not authorized to hire ex-Rutherford employees at wages, hours and conditions of employment which were different from those which had been in effect at Rutherford (Appendix, p. 6a).

In passing upon the Board's remedy, the panel divided. The majority sustained the remedy upon the theory that it was within the discretionary power of the Board and, therefore, should not be disturbed by the Court. In dissenting, Judge Bryan was of the opinion that a remand to the Board for fixing of a new remedy is compelled by the want of substantial evidence to support the Board's order requiring restoration of Rutherford employee benefits regardless of Overnite's good-faith bargaining (Appendix, p. 12a).

## REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. Both the Interstate Commerce Commission and the National Labor Relations Board have exercised jurisdiction over the subject matter in controversy and have issued conflicting orders with respect to it. The Court of Appeals has granted enforcement of the Board order, even though it collaterally nullifies the prior order of the Commission, which had been affirmed both by a three-judge court and by this Court.

2. The decision of the Court of Appeals in this case is in direct and pointed conflict with a decision of another Court

of Appeals upon the important jurisdictional question here in issue.

3. In its order, the National Labor Relations Board assumed the power to require collective bargaining by a common carrier before an employer-employee relationship was created, even though Congress has not authorized such bargaining outside the construction industry. The Board has thereby decided an important question of Federal law which has not been, but should be, settled by this Court.

4. The decision of the Court of Appeals is in direct and pointed conflict with a decision of another Court of Appeals upon the question of whether the National Labor Relations Board has the authority to require an employer to install employee wages and benefits to which the employer has never agreed.

5. The Court of Appeals has decided Federal questions in ways which sharply conflict with applicable decisions of this Court.

6. The order of the National Labor Relations Board and the decree of the Court of Appeals enforcing it raise important questions of Federal law which, if not settled by this Court, will gravely affect rearrangements of common carrier enterprises, and will proliferate into the future, uncertainty, litigation, and conflicts of decisions among the Federal courts.

## ARGUMENT AMPLIFYING REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

### I. Nullification Or Modification Of The Order Of The Interstate Commerce Commission By The National Labor Relations Board Is Specifically Prohibited By Statute

The ruling of the National Labor Relations Board in this case is that the prerogative of common carriers to rearrange

their businesses must be balanced by some protection to their employees from a sudden change in the employment relationship and that, in absence of pre-hire collective bargaining, no such protection exists. Upon the basis of these assertions, and upon them alone, the Board retroactively applied a newly improvised doctrine of compulsory pre-hire bargaining to "protect" the employees of the seller in this case, not because any existing statutory authority requires such pre-hire bargaining, but only because the Board says that such protection "ought to be given."

There can be no doubt that, by means of these strange and novel pronouncements, the Board has boldly entered into a field which has been reserved by Congress for the Interstate Commerce Commission for nearly half a century. It is equally as clear that the Labor Board's order, and the Court decree enforcing it, contravene a statute which was enacted by Congress for the very purpose of precluding the issuance of orders or decrees having the effect that this order and this decree do have—that is, orders and decrees which interfere with the Commission's exercise of its exclusive and plenary jurisdiction. And further, the Board's order and the Court's decree directly conflict with the prior judgment of another court, which judgment has been specifically affirmed by this Court.

The temporary fixing of wages, hours and conditions of employment by public authority in the transportation industry, pending the time when such matters can feasibly and appropriately be worked out through collective bargaining, reaches back into history for more than fifty years. In 1916, Congress found it necessary to intervene directly in collective bargaining by establishing hours of work and wages to be paid in the rail industry to avoid a threatened interruption of

public transportation. An attack on that action before this Court raised the following issue:

> "Did Congress have power, under the circumstances stated, that is, in dealing with the dispute between the employers and employees as to wages, to provide a permanent eight-hour standard and to create by legislative action a standard of wages to be operative upon the employers and employees *for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages?*" (emphasis supplied)
>
> *Wilson v. New*, 243 U.S. 332, 346, 37 S. Ct. 298, 301, 61 L. ed. 755, 772, 773 (1917)

In sustaining that action of Congress, the Court first took note of the legal obligation of carriers to provide continuous service, and of the regulation of labor relations which Congress enacted to enable them to do so. The Court then made these observations:

> ". . . [W]hat benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employee . . . and to give the latter peculiar and special rights safeguarding their persons, . . . if there was no power to remedy a situation created by a dispute between employers and employees as to rate of wages, which, if not remedied, would leave the public helpless, the whole people ruined, and all the homes of the land submitted to a danger of the most serious character? And finally, to what derision would it not reduce the proposition that government had power to enforce the duty of [continuous] operation if that power did not extend to

doing that which was essential to prevent operation from being completely stopped by filling the interregnum created by an absence of a conventional standard of wages, because of a dispute on that subject between the employers and employees, by *a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties?*" (emphasis supplied)

*Wilson v. New*, 243 U.S. 332, 351, 37 S. Ct. 298, 303, 61 L. ed. 755-775 (1917)

Four years later Congress again exercised the same authority to provide means other than collective bargaining for the temporary setting of wages, hours and conditions of employment in the transportation industry in order to avoid crippling interruptions from labor disputes arising directly out of rearrangements of common carrier businesses. After it reasserted the existing requirement that all purchases of common carrier properties were subject to approval and authorization of the Interstate Commerce Commission, Congress authorized the Commission to attach to its approval "such terms and conditions and such modifications as it shall find to be just and reasonable" and "consistent with the public interest." Transportation Act of February 28, 1920, 49 U.S.C. §5(2)(b). Under this authority, the Commission established the practice of specifying terms and conditions for protection of employees who might be adversely affected by purchase and merger transactions. The exercise of that authority was challenged before this Court in *United States v. Lowden*, 308 U. S. 225, 60 S. Ct. 248, 84 L. ed. 208 (1939). In sustaining the Commission, this Court stated:

". . . [T]he issue is narrowed to a single question whether we can say, as matter of law, that the granting or withholding of the protection afforded to the employees by the prescribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern.

. . .

"One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

. . .

"The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

. . .

". . . [W]e do not doubt that Congress, by its choice of the broad language of §5(4)(b) intended at least to permit the Commission, in authorizing railroad consolidations and leases, to impose upon carriers conditions related, as these are, to the public policy of the Trans-

portation Act to facilitate railroad consolidation, and to promote the adequacy and efficiency of the railroad transportation system."

*United States v. Lowden,* 308 U.S. 225, 231, 234, 235-236, 238, 60 S. Ct. 248, 251, 253, 254, 255, 84 L. ed. 208, 214, 215, 216, 218 (1939)

All of the foregoing is, of course, applicable to the present case since, in 1940, Congress extended the Interstate Commerce Act to bring motor carriers within the provisions of Section 5 of that Act. See 49 U.S.C. §5(13).

In order to protect anyone aggrieved by an order of the Commission, Congress provided a special procedure for judicial review, which includes a direct appeal to this Court in lieu of the usual petition for certiorari, 28 U.S.C. §§2321-2325, 1253. And, having provided for direct appeal as a means for redress of any wrongs which might be committed by the Commission, Congress directed — by the strongest language conceivable — that there should not be any other attack upon, or conflict with, an order of the Commission in any form, shape or fashion.

"The authority conferred by this section *shall be exclusive and plenary,* and *any carrier or corporation participating in or resulting from* any transaction approved by the Commission . . . shall have full power . . . to carry such transaction into effect . . . [and] shall be and they *are relieved from the operation of . . . all other restraints, limitations, and prohibitions of law, Federal, State, or municipal,* insofar as may be necessary to enable them to carry into effect the transaction so approved. . . ." (emphasis supplied).

49 U.S.C. §5(11)

Accordingly, when Overnite proposed to purchase assets from Rutherford, it was not free to decide, either by itself or in mutual agreement with any labor organization or other entity, what arrangements it would make for the protection of Rutherford employees pending consummation of the transaction if the Commission approved it. Overnite was bound by law to submit to the will of the Commission with respect to all these matters.

Recognizing this fact, Overnite reserved the contract right to refuse to consummate the purchase if unacceptable conditions for employee protection were attached to the Commission's approval (220, 237). And throughout every stage of the litigation before the Commission, Overnite met each issue on its merits without ever raising a contention that the Commission had anything less than complete jurisdiction over all of these matters.[1] The Union unreservedly espoused a total commitment to the proposition that all matters relating to pre-employment protection for employees were to be resolved by the Commission and *not* through collective bargaining. The Union demanded that the Commission should require *"Overnite to lay out specific . . . protections for the Rutherford employees"* (169, 192-193) (emphasis supplied). And when Overnite did lay out specific and detailed protections as to all phases of the employment relationship, the Union used every available means to require that these protections be increased by legal processes without ever indicat-

[1]As only one example, Overnite's counsel stated to the Commission that, "We have undertaken to bring before you the evidence regarding the effect of the proposed transaction upon the employees of Rutherford, and *that is properly before you and is one of the things with which you are concerned"* (166) (emphasis supplied).

ing, expressly or by inference, that Overnite should engage in extra-judicial bargaining with the Union before consummation of the purchase transaction.

The extensive litigation which the Union initiated and prosecuted before the Commission, and before the courts on appeal from the Commission's order, over the question of whether Overnite would be bound to pay or maintain Rutherford wages and terms and conditions of employment for ex-Rutherford employees continued for three and one-half years.

After the Commission considered in great detail all that was before it, and the powers which it possessed, it issued an order holding clearly and unequivocally that *Overnite should not be required to commit itself to the expenses for additional employee protections urged by the Union*, and it affirmatively approved the employee protections which Overnite had proposed with the one addition previously noted.[1]

After that, over three and one-half months passed without a word from the Union from which anyone could glean a contention either that the Commission had exceeded its jurisdictional authority or that Overnite was obligated to bargain with the Union prior to consummating the transaction. All of the Union's actions pointed directly to a contrary conclusion. Throughout this period, the Union was busily

[1]By incorporation of Overnite's proposals, the Commission's order included directives with respect to the number of employees Overnite would be expected to hire, the classifications into which they would be hired, the locations, including provisions for moving expenses of transferred employees, wages, hours of work, vacations, holidays, pensions, insurance, educational and recreational benefits, working conditions, seniority integration and severance pay, to which it added a requirement for limited compulsory arbitration (197-198, 201-202).

engaged in bargaining with Rutherford for a new contract to cover the employees in question, this being an obvious concession that Rutherford and not Overnite was their employer throughout this period (104-108, 121-141).

Also during this interval, the Union merely notified Overnite that Rutherford employees had "expressed an interest in working for Overnite when and if you consummate your contract with Rutherford *in accordance with the ICC decision*" (emphasis supplied), and requested advice as to the date on which it was intended that the transaction would be closed (Co. 21, 144). Overnite responded courteously to this request (Co. 22, 145-146), and immediately notified the Union of the consummation date when it became known (Co. 23, 147).

After Overnite accepted the conditions which had been imposed upon the transaction by the Commission, and relinquished its contract reservation of right to reject the transaction in its entirety, the Union utilized the statutory appeal procedure by petitioning a special three-judge court for an injunction against the Commission and its order. And again there was not one word from the Union, either directly or by inference, to the effect that there was any limitation whatever on the Commission's authority in this matter, it being the Union's ardently asserted claim that the Commission had not exercised its authority to protect employees to the fullest extent which was required by law.

The reviewing Court framed the issue raised by the Union's petition as follows: "Is the protection granted the motor carrier employees in the purchase transaction before the Court fair and equitable both to the employees and to the involved carrier?" After noting with approval the Commission's findings as to the precarious financial condition of the

business which Overnite proposed to purchase, the Court answered the issue in the affirmative, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. United States,* 253 F. Supp. 481 (D.D.C. 1966). The Union appealed directly to this Court and, upon motions of the Commission and Overnite, this Court affirmed that decision, 385 U. S. 38, 87 S. Ct. 240, 17 L. ed. 2d 35 (1966).

If, upon the plain wording of Section 5(11) of the Interstate Commerce Act, quoted above, there ever could have been any doubt that the Commission's order and the Court decrees which affirmed it were final and binding, such doubt should be erased completely by the following precedents, and there are no other precedents, dealing with this matter:

> "While the three Supreme Court cases just discussed do not deal directly with the specific problem now confronting us (namely, whether the provisions relating to merger and providing for compensation for affected employees take precedence over the provisions of the Railway Labor Act) in the situation here presented we believe that the cases afford very substantial support for the view that *Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers.* Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of §5(11) conferring *exclusive and plenary* jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.
>
> "Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the pro-

visions of the Railway Labor Act from the operative provisions of §5(11) (emphasis supplied).

. . .

"The Commission did actually approve the proposed merger and the included agreement for the protection of railroad employees as it was authorized to do. Such approval, in absence of language manifesting a contrary intent, carried with it any exemption from the restraints of other laws as contemplated by §5(11) to the extent necessary to carry out the merger."

*Brotherhood of Locomotive Engineers v. Chicago and North Western Ry. Co.*, 314 F. 2d 424, 431-432 (8 Cir. 1963) *cert. den.* 375 U. S. 819, 84 S. Ct. 55, 11 L. ed. 53 (1963)

This precedent is as persuasive and binding as it would have been if the case had involved motor carriers instead of rail carriers. The Commission supervises consolidations and mergers of both rail and motor carriers under the same provision of the Interstate Commerce Act. See 49 U.S.C. §5(13); *McLean Trucking Co. v. United States*, 321 U. S. 67, 64 S. Ct. 370, 88 L. ed. 544 (1944).

The same principle has been established in air transportation cases where the Civil Aeronautics Board performs the function which is exercised here by the Interstate Commerce Commission and where the Railway Labor Act controls such labor matters as are administered by the National Labor Relations Board in other cases. See *Oling v. Air Line Pilots Ass'n.*, 346 F. 2d 270 (7 Cir. 1965); *Hyland v. United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill. 1966). The relief

from other laws given to rail and motor carriers by Section 5(11) of the Interstate Commerce Act is also given to airlines, in implementing approved mergers, by Section 414 of the Aviation Act. 49 U.S.C. §1384. In the *Hyland* case, the Court aptly stated:

> "This important area of the total complex of merger considerations cannot be subject to independent scrutiny and interference by the courts pursuant to a separate statutory scheme. *The parties affected by the CAB merger order cannot be required to answer in different forums at different times on different charges for actions taken under the CAB merger umbrella*" (emphasis supplied).
>
> *Hyland v. United Air Lines, supra*, at p. 372

There are simply no means whereby the Labor Board's order can be sustained unless the action of Congress in enacting Section 5 of the Interstate Commerce Act is to be treated as an idle gesture and the extensive litigation of the parties pursuant to that Act is to be regarded an exercise in futility. That is precisely the treatment accorded them by the Board.

It is doubtful that words could be found which would more vividly expose the invalidity of the Board's order than those which were used by the Board in its own rationalization of its order. Thus, in the face of the Congressional prohibition against unsupervised rearrangements of common carrier enterprises and the legion of Interstate Commerce Commission cases protecting employees pursuant to the Congressional authority noted above, the Board declared that, "Under these circumstances the objectives of national labor policy require that 'the rightful prerogative of owners independently to rearrange their businesses . . . be balanced by some pro-

tection to the employees from a sudden change in the employment relationship' " (22). This was a fragmentary quotation from *John Wiley & Sons, Inc. v. Livingston,* 376 U. S. 543, 549, 84 S. Ct. 909, 914, 11 L. ed. 2d 898, 904 (1964), where this Court dealt with the question of whether a contractual requirement for arbitration was binding on a successor corporation. The Board completely ignored the obvious fact that the *Wiley* case did not involve a regulated common carrier or an Interstate Commerce Commission proceeding. Moreover, the Board failed to heed the Court's admonition that, "This case cannot readily be assimilated to the category of those" cases such as this "in which there is no contract whatever. . . ." *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 550, 84 S. Ct. 909, 915, 11 L. ed. 2d 898, 905 (1964).

Next, in total contradiction of the facts which it had erroneously removed from the case as being irrelevant, the Board "found" that, *"The only protective balancing that is available in the present situation is that the employees be given the protection and assistance of collective bargaining before the change in corporate ownership is permitted to alter their economic relationship with their employer"* (22) (emphasis supplied). If there had been any rational basis on which to support the Board's order, surely the Board would not have found it necessary to resort to "fact finding" that ignores the "protective balancing" which has been accorded in such cases by Congress and the Commission for more than 45 years.

In sole reliance upon these indefensible propositions, the Board ordered Overnite to "restore the wages, hours and working conditions which prevailed at these terminals on

November 19, 1964, just before [Overnite] assumed control of them . . ." (24-25), and to "make employees whole for any economic loss they suffered as a result of [Overnite's] unlawful action . . ." (25)—*all of which is precisely what the Commission, with court approval, ordered that Overnite should not be required to do!*

The panel decision of the Court of Appeals is equally at odds with the provisions of the Interstate Commerce Act. While the Court of Appeals inferentially acknowledged that the Commission did have some authority to protect employees in such cases, its decision cannot be squared with the Congressional mandate that the Commission's jurisdiction to establish such protections is "exclusive and plenary" and that carriers implementing Commission orders shall be forever immune against any and all "restraints" of government.

> *"There is no need to discuss at length Overnite's reliance upon the Interstate Commerce Commission proceedings to justify its conduct.*
>
> . . .
>
> "Overnite contends that the power of the ICC to condition approval of the sale and transfer of assets upon the vendee's agreeing to fair and equitable protection of employees, and its partial exercise of that power, precludes the Labor Board from granting further protection under the National Labor Relations Act. This contention is without merit. . . . *Whatever the ICC may do, the Labor Board retains full authority to provide further protection of employees in enforcement of the National Labor Relations Act*" (Appendix, p. 9a) (emphasis supplied).

This decision cannot be reconciled with the decision of the Court of Appeals for the Eighth Circuit in *Brotherhood of*

*Locomotive Engineers v. Chicago and North Western Ry. Co.*, 314 F. 2d 424 (8 Cir. 1963) *cert. den.* 375 U. S. 819, 84 S. Ct. 55, 11 L. ed. 2d 53 (1963).

In addition to contradicting Section 5(11) of the Interstate Commerce Act, the Court's pronouncement fails to take into account the fact that the National Labor Relations Act contains the express provision that the duty to bargain collectively "does not compel" the employer "to agree" to any particular "proposal or require" the employer to make any "concession" as to the terms on which the persons in an appropriate bargaining unit shall continue in their employment, National Labor Relations Act, §8(a), 29 U.S.C. §158(a). Since the Board has no authority to provide any such "further protection of employees" in negotiations concerning employees already hired, *a fortiori* it has no authority to do so with respect to the terms of initial employment of persons not yet hired.

Citizens must "naturally trust in their government and ought to do so, and *they ought not to suffer for it.*" *Menges v. Dentler*, 33 Pa. 495, 500 (1858) (emphasis supplied). Overnite has trusted completely in the Government here—the Interstate Commerce Commission and the Courts which affirmed its order—and if the Board's order is allowed to stand, Overnite will pay dearly for that trust. More importantly, if valid orders of the Interstate Commerce Commission are to be so lightly regarded, how can any of the nation's carriers depend upon such orders in making rearrangements of their businesses in the numerous cases which inevitably will arise in the future?

## II. The National Labor Relations Board Had No Authority To Require The Petitioner To Engage In Anticipatory Pre-purchase Collective Bargaining And The Court Of Appeals Exceeded Its Authority In Sustaining The Board's Order On Grounds Not Considered By The Board.

Collective bargaining by one not presently an "employer" within the meaning of the National Labor Relations Act, in anticipation that he will later become such an employer, is a violation of the law.[1] See, *e.g.*, *International Ladies' Garment Workers' Union v. National Labor Relations Board*, 366 U.S. 731, 81 S. Ct. 1603, 6 L. ed. 2d 762 (1961); *Local Lodge No. 1424, International Association of Machinists v. National Labor Relations Board*, 362 U.S. 411, 80 S. Ct. 822, 4 L. ed. 2d 832 (1960); *National Labor Relations Board v. Teamsters and Allied Workers, Hawaii Local 996*, 313 F. 2d 655 (9 Cir. 1963); *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 99 F. 2d 309 (8 Cir. 1938); *Ellery Products Mfg. Co.*, 149 NLRB 1397 (1964); *Crossett Co.*, 140 NLRB 667 (1963).

That these cases are completely consistent with the will and the understanding of the Congress is proven beyond doubt by the fact that Congress, after careful deliberation, chose to make such anticipatory bargaining not required but *permissible* in the "building and construction industry." 29 U.S.C. §158(f); See discussion under "Building and Construction Industry Amendment," S Rep No. 187, 86th Cong, 1st Sess (April 14, 1959). Obviously, if Congress had not con-

[1]Except in the construction industry as to which Congress has made an exception in the rule, National Labor Relations Act, 29 U.S.C. §158(f).

sidered such bargaining unlawful, there would have been no reason for this special enactment permitting it in that industry.

The Board's scrutiny of Overnite's conduct covered the period *before* as well as *after* the purchase of Rutherford's assets. In its investigation, *the Board found no violation by Overnite of its duty to recognize and bargain in good faith after it consummated the purchase* (39-40). In other words, as to that period of time, the Board found that Overnite's recognition of the Union was timely[1] and that its subsequent bargaining was in good faith (40). There was no allegation in the complaint to the contrary and, with obvious approval, the trial examiner noted in his decision that "Respondent Overnite recognized the Union as the exclusive bargaining agent of the employees at the Roanoke and Pulaski terminals on November 30, and since then has bargained with the Union" (16). As to that recognition and bargaining, there is not a word of critical comment in the Board's decision.[2]

The complaint which issued pursuant to the investigation was limited to the single charge that Overnite "failed to notify, consult with, and bargain collectively with the Union" concerning the terms upon which it would employ former Rutherford employees at the moment of take-over — that is, Overnite failed to bargain *before* consummation (5). Throughout its decision, as to its dealings with the Union, the Board emphasized again and again that the only misconduct found against Overnite was its failure to engage in anticipatory pre-purchase bargaining. For example:[3]

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[1]In the ordinary sense, where employers accord recognition voluntarily in response to requests that they do so.

[2]Except for the technical matter of not restoring conditions which prevailed at Rutherford *before* the purchase (16).

[3]In each of the quotations, emphasis is supplied.

". . . [Overnite] has refused to undue (sic) its unilateral action and restore to employees the wages, hours and working conditions they enjoyed just *before takeover.* . . . (16).

. . .

"[The Union's] *pretakeover efforts to deal with the purchaser* . . . were nullified by Overnite's refusal to recognize and bargain with it until *after* Overnite unilaterally changed the very wages, hours, and working conditions the Union was trying to protect. . . . (21).

. . .

"The only protective balancing that is available in the present situation is that the employees be given the protection and assistance of collective bargaining *before the change in corporate ownership is permitted to alter their economic relationship* with their employer (22).

. . .

". . . [Overnite] deprived the employees of the protection the Act gives them when it [consummated the transaction] *before it notified the Union of its intent and gave the Union an opportunity to bargain concerning the proposed changes.* Under all the circumstances of this case this unilateral action was a violation of Section 8(a)(5) and (1) of the Act (22-23).

. . . .

". . . [B]y unilaterally changing the wages, hours and working conditions of employees [that is, by hiring them] without notice to or *prior bargaining* with the Union concerning them, Respondent has violated and is violating Section 8(a)(5) and (1) of the Act (27).

. . .

". . . Respondent [shall] restore the wages, hours and working conditions which prevailed at these terminals . . . just *before* Respondent assumed control of them. . . ." (24-25).

In making these novel pronouncements, the Board never mentioned the precedents which condemn pre-hire bargaining as an unfair labor practice or the manifested will of Congress that such anticipatory bargaining, even on a voluntary basis, shall be strictly limited to the construction industry. Nor did the Board come to the important question raised by the glaring absence of an employer-employee relationship between Overnite and Rutherford's employees. The Board acknowledged that it was ". . . not until the moment that the deal was closed [that the parties were] absolutely certain that it would be consummated" (12), that until the ". . . takeover on November 19, Rutherford had [engaged in] continuing negotiations with the Union" (15), and that ". . . the Union had tried to protect the employees' posttakeover interests by its pretakeover bargaining with the seller . . ." (21). The Board did not attempt to explain how Overnite might lawfully be held to be the "employer" of individuals who were then "employees" of Rutherford. Nor did the Board deal with the question of how Overnite might lawfully have intervened in the bargaining as to these persons while Rutherford had, and was fully discharging, the obligation to bargain as to them.

The Board's treatment of the related fact that the Union had never requested pre-purchase bargaining with Overnite is equally as peculiar. Thus, although the Interstate Commerce Commission proceedings were rejected as irrelevant, the trial examiner, with Board approval, considered this *rejected evidence* as *proof* "that Respondent knew prior to

its unilateral action of November 19, 1964, that the Union was claiming and requesting bargaining rights for the employees . . . and Respondent chose to ignore that claim and request" (21). This, of course, is nothing less than a flat contradiction of the undisputed evidence which showed unequivocally that the Union chose to *litigate* with Overnite over prospective wages, hours and conditions of employment while it was engaged in *bargaining* with Rutherford over those subjects. It is also in direct conflict with the undisputed fact that, instead of ignoring the Union at the moment of take-over, Overnite took care to give written notice to the Union *immediately* upon its ascertaining that the proposed transaction would be consummated as authorized by the Interstate Commerce Commission.

The Board's peculiar selectivity in dealing with the record of the proceedings before the Interstate Commerce Commission is further demonstrated in its finding that, "The record contains no evidence of economic necessity as the motivation behind Respondent Overnite's refusal to maintain existing wage and economic levels at takeover. . . ." (16). The truth of the matter, on the contrary, is that economic necessity was the primary subject dealt with by the Commission. Upon the basis of the voluminous evidence relating to that subject, the Commission found, in light of Rutherford's losses, that ". . . any labor-costs reduction permitting vendor to continue in business presumably *would require the lowering of the existing wage scale or the elimination of the jobs of some employees*" (200) (emphasis supplied).

As might reasonably be expected, Overnite had no interest in assuming and continuing the severe losses which were being sustained by Rutherford.

When the case reached the Court on appeal, the Board finally conceded that, *"It is true, of course, that the Company was not required formally to recognize and deal with the Union prior to consummation of the sale"* (Board's brief, p. 13) (emphasis supplied). Since the Board's entire case against Overnite was made to rest upon the single, and admittedly unsupportable, proposition that Overnite was required to recognize and deal with the Union prior to consummation of the sale, that concession obviously required a denial of enforcement by the Court in spite of Board counsel's efforts to rationalize the decision on other grounds.

> "We . . . hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."
>
> *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 95, 63 S. Ct. 454, 462, 87 L. ed. 626, 637 (1943)

> "[Courts] must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."
>
> *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577, 91 L. ed. 1995, 1999 (1947)

"The courts may not accept appellate counsel's post hoc rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself. . . .

. . .

"For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate, the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency'" (citations omitted).

*Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156, 168, 169, 83 S. Ct. 239, 246, 9 L. ed. 2d 207, 216 (1962)

With all due respect, it is submitted that the Court of Appeals failed to observe this well-settled principle and that, by reason thereof, it erroneously sustained the order on the basis of nebulous and inaccurate theories which Board counsel advanced during the appeal in an effort to rationalize the order in spite of counsel's admission, in effect, that such order was invalid on its face.

Thus, the Court first acknowledged that, "Our case does not come squarely within *Wiley* because the Rutherford collective bargaining contract had expired prior to take-over"[1] (Appendix, p. 5a). Then, however, the Court stated that, "*Wiley* reaches beyond the Board's order in this case and, in so doing, strongly supports the more limited successor doctrine developed by the courts of appeal but not as yet expressly declared by the Supreme Court" (Appendix, p. 5a).

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[1]Apparently that was in deference to this Court's admonition in *Wiley* that, "This case cannot readily be assimilated to the category of those in which there is no contract whatever. . . ."

*John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 550, 84 S. Ct. 909, 915, 11 L. ed. 2d 898, 905 (1964)

This latter observation conflicts directly with this Court's expressed limitation in *Wiley* that, "[W]e do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership." *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 551, 84 S. Ct. 909, 915, 11 L. ed. 2d 898, 905 (1964).

The Court of Appeals then cited a number of cases to support the proposition, ". . . that if the transfer of assets and employees from one employer to another leaves intact the identity of the employing enterprise, then the former's duty to recognize and bargain with an incumbent union devolves upon the latter as 'successor employer' " (Appendix, p. 5a-6a). Those cases, however, merely held that "successor employers" violated the law by refusing to *recognize* the union and to bargain upon demand *after they became successors* and at a time when they had no good-faith doubt of the union's representative status. These precedents obviously fall far short of lending any support to the Board's ruling in this case that Overnite was legally bound to *recognize and bargain* with the Union *before it became a "successor employer"* and before the Union demanded, or had the right to demand, bargaining with Overnite.

It only begs the question to say here that Overnite was a so-called "successor employer," for Overnite fully discharged every obligation which has ever been required of "successor employers" heretofore in such situations. The Board's finding of no violation by Overnite during the successorship establishes with legal finality that this is true.

The entire controversy, and the errors here noted, may be traced directly to the Board's underlying mishandling of the "successor employer" doctrine. Thus, upon the mere basis

that Overnite is a "successor," the Board has steadfastly insisted that, as a matter of law, there has been one, and only one, employer of the individuals involved. It has blindly refused to accept that two separate and independent corporations existed before and survived after the transaction, that there was a *hiring* of one corporation's employees by the other, and that before the hiring there was one employer while after the hiring there was another and different employer. It is for this reason that the Board invariably characterized Overnite's hiring of employees as "unilateral action."

If any explanation is needed to show that the issue cannot properly be resolved upon the basis of any such linguistic manipulations as that, such explanation is readily found in Section 5(11) of the Interstate Commerce Act. There, in providing interim protection for employees to be affected by rearrangement of carrier operations, the Interstate Commerce Commission is given "exclusive and plenary" jurisdiction over "any *carrier or corporation participating in or resulting from* any transaction approved by the Commission" (emphasis supplied), and any such carrier or corporation is immunized against other restraints issued by any agency of government, including the National Labor Relations Board. No amount of argument or explanation or sophisticated phraseology can alter the fact that Overnite either participated in or resulted from the transaction which the Commission approved here. And, so no label such as "successor employer" can remove Overnite from the coverage and protection of that section of the Interstate Commerce Act.

Confusion over these principles is manifested in the peculiar contradictions between the Board's order and the Court's decree. While the Board found a violation only with

respect to the pre-purchase conduct of the Company, the Court apparently held an opinion to the contrary—that no such violation existed. Insofar as is made to appear in the record, the Court accepted the concession of Board's counsel noted above. Conversely, the Board found no violation with respect to the post-purchase conduct of the Company and gave no consideration to that in its deliberations. But the Court, again contrary to the Board, concluded that Overnite's post-purchase conduct amounted to an illegal refusal to bargain:

> "Overnite had a duty to bargain on the day of take-over, November 19, 1964, which it did not recognize until eleven days later on November 30. *We do not mean to imply that Overnite had on November 19 an affirmative duty to at once seek out the Union to begin bargaining*" (Appendix, p. 6a) (emphasis supplied).

The eleven-day interval between consummation and formal recognition was explained to the Board's satisfaction during the investigation. The Union's request for recognition, addressed to A. M. Price, was dated Friday, November 20, 1964, and could not possibly have reached Overnite until the next week (147-148). On Wednesday of that week, Price's secretary notified the Union that the reply would be delayed due to Price's absence, but it would be forthcoming "shortly after he returns" (148). This promise was fulfilled immediately upon Price's return on the following Monday, when he voluntarily recognized and offered to bargain with the Union at these terminals (149-150). *Another two weeks went by before the Union even requested bargaining* (151). It is not surprising, therefore, that the Board found no misconduct or unnecessary delay in this transaction. With all due

respect, the Court's finding to the contrary is precisely the sort of "propelling of the court into the domain . . . of the administrative agency" which was precluded by this Court in the *Chenery* and *Burlington Truck Lines* cases.

Finally, the Court ruled that Overnite was not "free to act unilaterally" during the time when, admittedly, it had no "affirmative duty" to seek out and bargain with the Union. Again, with all due respect, it is submitted that this is patent error since the duty to refrain from unilateral action arises only from the corresponding duty to bargain. It cannot exist when there is no duty to bargain. *National Labor Relations Board v. Katz,* 369 U.S. 736, 82 S. Ct. 1107, 8 L. ed. 2d 230 (1962); *May Department Stores Company v. National Labor Relations Board,* 326 U.S. 376, 66 S. Ct. 203, 90 L. ed. 145 (1945).

If pre-hire or pre-purchase bargaining is to be required, it can be so only by virtue of valid action of Congress and not by mere order of the National Labor Relations Board.

> "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the *unauthorized assumption by an agency of major policy decisions properly made by Congress*" (emphasis supplied).
>
> *American Ship Building Company v. National Labor Relations Board,* 380 U.S. 300, 318, 85 S. Ct. 955, 967, 13 L. ed. 2d 855, 867 (1965)

> "The Supreme Court has made it clear that *national labor policy is for the Congress and not the Board to determine*" (emphasis supplied).
>
> *Armco Steel Corporation v. National Labor Relations Board,* 344 F. 2d 621, 625 (6 Cir. 1965)

## III. The Board's Unprecedented Remedy Was Issued Arbitrarily In Disregard Of The Petitioner's Rights And Of The Limitations Upon The Board's Authority.

Even if it were to be assumed *arguendo* that the Board had the authority to require pre-purchase collective bargaining, still there is no legal justification for the Board's "remedy" in this case.

That Rutherford was on the road to financial disaster was established without contest (15, 199-200). On account of lack of work, some of Rutherford's employees were earning as low as one-fourth of what Overnite's employees were earning at the same time (227-230). Had Overnite not taken over Rutherford's assets, Rutherford's employees faced the almost certain and immediate prospect of being out of work completely.

As the Court noted, throughout the litigation before the Commission, and in its subsequent collective bargaining, Overnite made it clear that it could not and would not agree to take on the onerous costs which had contributed materially to Rutherford's financial distress (Appendix, p. 3a). Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d), fully protected Overnite's right to maintain this position.

Prior to consummation of the purchase, Rutherford bargained to an impasse with the Union over its proposal for a new contract with wages and benefits lower than those which ultimately were installed by Overnite after the purchase was completed (Co. 18, 126-141). Moreover, Rutherford had notified the Union, in effect, that these lower rates and benefits would be instituted, over the Union's objections, at an

early date (138-139). Rutherford had already gone through this same process in Bristol and had put the lower rates into effect after coming to the same sort of impasse with the Union at that terminal (104-106, 121-124).

As has already been noted, promptly following the purchase, Overnite engaged in extensive bargaining with the Union, and it is conceded that such bargaining was in complete good faith. Appearing as a Board witness in this case, the attorney who bargained for the Union summarized Overnite's bargaining conduct in the following way:

> "They have generally taken the position throughout the negotiations that they will negotiate from which ever posture we would care to. However, we — however we wanted to handle it. Which ever proposal we wanted to take up, and to that extent they were willing to discuss it any way we wanted to discuss it" (95-99).

All of the foregoing circumstances point to the inescapable conclusion that, on November 19, 1964, Rutherford's employees — already suffering from low wages due to lack of work and confronted with the prospect of loss of their jobs — inevitably faced a reduction in their hourly rates and fringe benefits. Moreover, of all the possible alternatives in prospect for them, hiring as proposed by Overnite was the one which would prove by far the most advantageous to them.

Despite all of this, and despite the Interstate Commerce Commission litigation and good-faith bargaining by both companies, the Board approached the issue of remedy as if it were dealing with an employer who, during a period of bargaining over established employee benefits, suddenly slashed such benefits for the deliberate purpose of undermining a certified union and disparaging the bargaining

process — all to the complete surprise of the Union and the detriment of his employees.

Thus, the remedy ordered by the Board directs that Overnite:

> ". . . *restore the wages, hours and working conditions which prevailed* at these terminals on November 19, 1964, *just before Respondent assumed control* of them, *and make employees whole* for any economic loss they suffered as a result of Respondent's unlawful action *by paying each of them the difference between Rutherford's prevailing wages on November 19 and the new scale of wages Overnite placed them on at takeover;* by paying each of them for at least 8 hours' service each day he worked and at the rate of time-and-a-half for each hour worked over 40 hours per week since November 19, 1964; and by paying to each employee a sum equal to any contributions he has made to insurance and pension programs since November 19, 1964. All of this backpay shall continue running until the date Respondent shall comply with the recommendations herein . . . with interest added thereto. . . ." (24-25, 28) (emphasis supplied).

This, of course, is exactly what Overnite has maintained throughout the years of litigation and bargaining that it could not do. *It is also precisely what the Interstate Commerce Commission, and the Courts which affirmed its order, have decreed that Overnite shall not be required to do.* Even if a Board order requiring pre-purchase collective bargaining is not an additional "restraint" of government which is prohibited by Section 5(11) of the Interstate Commerce Act, surely the same thing cannot be said for this "remedy," that would require Overnite to pay out large sums of money which the Commission order and court decrees affirming it,

by virtue of that statutory provision, have determined that Overnite cannot be required, by any authority, to pay out.

That the Board's "remedy" is illegal and punitive and not remedial is easily demonstrated in a number of ways. First, as to the practical effect of the order itself, even though Overnite maintains a company-financed pension plan with benefits which, arguably at least, are far better than those provided in the Union's own plan (232-234), the Board has unhesitatingly decreed that Overnite shall contribute retroactively to the Union's plan also. The same is true with respect to insurance. Overnite's group insurance program provides benefits comparable to, if not better than, the Union's plan (231-232). But the Board again orders double protection by directing Overnite to contribute retroactively to the Union's plan. *Rutherford employees never enjoyed double pension and insurance coverage under the status quo ante!*

Just as truly, unjust enrichment of these employees is required by the Board's remedy with respect to wages. Frequent reference has been made to the fact that the *hourly rate* proposed and installed by Overnite was lower than that called for in the Union's expired contract. Yet the Board and the Court of Appeals have completely ignored the established facts that entitlement to higher hourly rates is of no benefit when there is no work to do and that a reduction in those hourly rates was inevitable and imminent in any event. Further ignored was the fact that the employees benefited greatly by the regular work which was provided for them by Overnite. In light of these circumstances, how can it logically or reasonably be stated that the Board's order would merely restore the *"status quo ante"?* (28).

The truth of the matter is that restoration of the so-called *"status quo ante"* is an impossibility in this case. In the first

place, it would necessarily include the constitutionally protected contract right of Overnite to refuse to complete the purchase if the conditions now attached by the Board were imposed upon it. Overnite has repeatedly made it clear that it would unhesitatingly exercise that right under such circumstances (197). Hence, the *status quo ante* would return the employees to an employer headed for bankruptcy.

When Overnite made this purchase, the Labor Board's only existing pronouncement as to legal principles controlling conduct of purchasers in such situations was directly contrary to its ruling in this case. At that time, the trial examiner who later denounced Overnite in this case was then presiding in the only prior case on record bearing any similarity to this one, and in that case he dismissed the refusal-to-bargain charge because the drivers involved had not "become the 'employees' " of the purchaser. *Chemrock Corporation,* 151 NLRB 1074, 1076 (1965).

It was over four months after Overnite had purchased Rutherford's assets, and during the period of its bargaining with the Union, that the Board reversed the decision of the trial examiner in that case. Even then, the majority of a divided Board panel emphasized that:

> *"We do not hold,* as Member Jenkins suggests, *that the purchaser* of an enterprise *is legally obligated to refrain from making any changes* in the employment status of his predecessor's employees *or to continue their employment under existing terms and conditions of employment"* (emphasis supplied). *Chemrock Corporation,* 151 NLRB 1074, 1080 (fn. 8) (1965)

Surely justice and fairness require that citizens should have at least some opportunity to adjust to novel doctrines

created by administrative agencies, and that they should not be subjected to punitive *ex post facto* regulation by such agencies.

> "The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any [misconduct] . . . is manifest. It is the sort of thing our system of law abhors."
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> *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F. 2d 141, 149 (9 Cir. 1952)

It seems that there should be no doubt that the instant case falls within the purview of this Court's admonition that:

> "Reviewing Courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds."
>
> *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490, 71 S. Ct. 456, 466, 95 L. ed. 456, 468 (1951)

As justification for its remedy, the Board contradicted the evidence with the unsupported assertion that if Overnite had "fulfilled its bargaining obligation . . . it is well within the realm of possibility that as a result of such bargaining the wages, etc. would not have been changed at all, or at least not so drastically. . . . [I]t is speculative, and cannot be determined, what rate of pay, hours and working conditions might have governed the employees' employment had [Overnite] fulfilled its obligation to bargain with their representative" (24). The facts established by the record show quite

to the contrary that there is nothing speculative about this matter, because no such possibility existed and it was well known by all concerned, long before take-over, what rates of pay and employee benefits Overnite intended to offer—and the maximum it was willing to offer—in connection with the proposed transaction.

Overnite's steadfast position during some four years of litigation as to these very wage rates and benefits, together with the actual results of intensive, good-faith bargaining that took place immediately after the alleged "unilateral action," clearly demonstrate that Overnite remained unconvinced after hearing again and again everything that the Union could advance by way of argument and persuasion in support of its demands.

According to the Board and Court of Appeals, the *only* way Overnite could have "fulfilled its obligation to bargain" in this situation was *to hire the former Rutherford employees on the same terms that had applied to them while working for Rutherford.* Since Overnite had repeatedly made it known that it would exercise its right to decline to purchase the Rutherford assets if any such conditions were imposed upon the purchase, the Board's speculation must necessarily lead to the conclusion that the employees in question have in no way been harmed since Overnite would never have become their employer under the conditions forming the basis of the speculation.

What the Board has done in this case as to "remedy" seems to be precisely the sort of administrative conduct which this Court struck down in *Burlington Truck Lines,* where it was found that an Interstate Commerce Commission remedy encroached upon the jurisdiction of the Labor Board.

"The difficulty with the order arises in connection with the findings and conclusions relevant to the choice of remedy. . . .

"There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' . . . 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' . . . And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' The agency must make findings that support its decision, and those findings must be supported by substantial evidence (emphasis in original).

. . .

"Commission counsel now attempt to justify the Commission's 'choice' of remedy on the ground that a cease-and-desist order would have been ineffective. *The short answer to this attempted justification is that the Commission did not so find*" (citations omitted) (emphasis supplied). *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 165, 167-168, 83 S.Ct. 239, 244, 245, 246, 9 L. ed. 2d 207, 214, 215-216 (1962)

The Court of Appeals adopted the Board's view, stating that "Overnite's *instant* unilateral action in violation of its

duty to bargain has made it impossible to determine what would have occurred had it moved more slowly"[1] (Appendix, p. 6a) (emphasis supplied). And yet the Court, in framing the issue presented to it, acknowledged ". . . *that the purchaser, Overnite, had made known in advance and consistently its unwillingness to maintain* [*the*] *level of employee benefits*" (Appendix, p. 3a) (emphasis supplied) which the Board had ordered Overnite to install retroactively and continue in effect for a period now covering more than two and one-half years. With all due respect, it appears that this is only another way of saying that Overnite is now properly ordered to yield *everything* demanded by the Union merely because it is allegedly impossible to determine whether it would have yielded *anything* whatever in pre-purchase bargaining!

The Court's approval of the Board remedy on that basis is squarely and directly in conflict with the ruling of the Court of Appeals for the Second Circuit in *Cooper Thermometer Co. v. National Labor Relations Board*, ___ F. 2d ___, 65 LRRM 2113 (April 1967). The latter case involved no change in corporate ownership or operation. The Board found, with court approval, that the employer there violated Section 8(a)(5) of the National Labor Relations Act in removing its plant for a distance of 28 miles and installing lower wages and benefits without proper bargaining with a certified union which represented its employees. And there, as here, the Board ordered reinstatement of wages and benefits which existed at the old plant with backpay for the differ-

[1]The Court did not explain how Overnite might be expected to move "more slowly" than it did when it submitted to the extensive litigation with the Union over the same subjects as to which it allegedly took "unilateral action" later. Moreover, in cases such as this where the purchaser is under a statutory duty to assume instantly upon consummation the obligation of rendering common carrier service in accordance with the authority granted by the Interstate Commerce Commission, what opportunity is there for the purchaser to "[move] more slowly"?

ence between that and the lower wages and benefits which were put into effect at the new plant. In rejecting that "remedy," the Court stated:

> *"A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress' direction in §8(d) that the obligation to bargain 'does not compel either party to agree to a proposal or require the making of a concession.'*
>
> . . .
>
> "The Examiner's solution—back pay at the rate provided in the old contract—*would make the workers not merely whole but very much more;* carrying over the old pay scales is something that Cooper was demonstrably unwilling to do and the Union rather obviously lacked economic power to compel.
>
> . . .
>
> "Recognizing there can be no ideal solution, we think that in this case back pay also should be based on the results of the bargaining now ordered or, if this has none, on the Middlefield scale. Here again we are also influenced by the greater severity of the order concerning this employer as contrasted with past treatment of more egregious violators of §8(a)(5) and the lack of reasoned explanation for the difference" (emphasis supplied).
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> *Cooper Thermometer Co. v. National Labor Relations Board,* ___ F. 2d ___, ___, 65 LRRM 2113, 2118, 2119 (April 1967)

In considering the appropriateness of the Board's choice of remedy in this case, the panel majority of the Court of Appeals followed the theory that courts should take a passive attitude in cases of this sort because "the task of devising

remedies . . . is purely a matter for administrative competence" (Appendix, p. 9a). Remedy directives, however, are left by the National Labor Relations Act absolutely and unqualifiedly within the discretion of the reviewing court—the court weighing and appraising them for itself and "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board" entirely as the court may see fit. National Labor Relations Act, 29 U.S.C. §160(e).

This Court has emphasized that courts of appeal should not hesitate to exercise that authority in appropriate cases such as this.

> "We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive.
>
> "In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end" (citations omitted).
>
> *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 11-12, 61 S. Ct. 77, 79, 85 L. ed. 6, 10 (1940), quoting from *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 235-236, 59 S. Ct. 206, 219, 83 L. ed. 126, 143 (1938)

"This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act."

*National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 349, 73 S. Ct. 287, 290, 97 L. ed. 377, 383 (1962)

## IV. Carrier Consolidations Which Would Further The Public Interest In Efficient Transportation Service Will Be Thwarted By The Conflicts Which Are Created By The Board's Order And The Decree Of The Court Below.

One result of allowing such a decision as has been rendered here to stand uncorrected was accurately foretold by Board Member Jenkins, dissenting in the *Chemrock* case.

"Finally, the majority has placed an unnecessary, and in some cases fatal, restraint on the free alienation of business enterprises or parts thereof. If a prospective buyer is not free to structure a new enterprise in such manner as will in his judgment convert a failing or non-profitable operation into a competitive and profitable venture, the likelihood that a business may be shut down or sharply curtailed by the prospective seller becomes greater." *Chemrock Corp.*, 151 NLRB 1074, 1086 (1965)

The Board's order here would restore the conditions which existed before Congress undertook regulation of rearrangements of common carrier businesses when consolidations were bogged down in fruitless collective bargaining. Are carriers, disappointed with protective orders of the Interstate

Commerce Commission, now free to insist upon, and to institute, less stringent protection for employees in collective bargaining — all in total disregard of the Commission's order? That, of course, is the principle of this case. If a carrier is *required* to disregard the Commission's order when the union is the disappointed litigant, is such carrier not obviously *permitted* to disregard such order when it is the disappointed litigant?

Questions equally as perplexing, and multitudinous in number, should be expected to arise if this ruling is not struck down by this Court. For example, is union recognition and collective bargaining now to precede resolution of the numerous and complicated questions of representation which arise under the National Labor Relations Act? And, if not, how are such questions to be resolved and bargaining also to be completed *instantaneously* as is seemingly required here? These few examples of the many problems, necessarily raised by the Board's decision, clearly show that it is the Board in this case which has far overstepped the bounds of its jurisdictional authority.

> "Implicit in this analysis is a recognition that if either agency is not careful it may trench upon the other's jurisdiction, and, because of lack of expert competence, contravene the national policy as to transportation or labor relations."
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> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173, 83 S. Ct. 239, 248, 9 L. ed. 2d 207, 219 (1962)

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Upon the basis of all the foregoing, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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